AFSLCC 2000 Alternative Dispute Resolution Briefing

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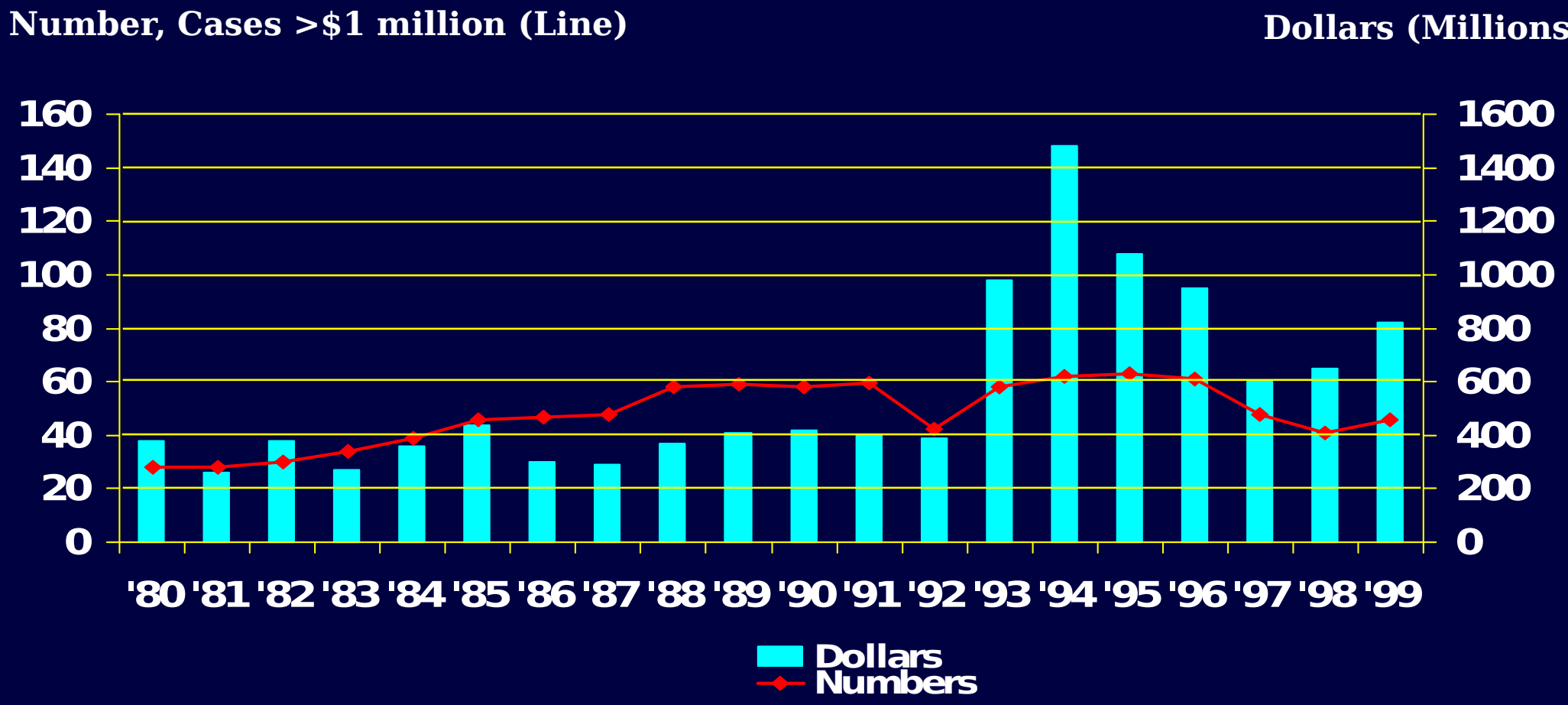
Putting Contract Disputes in Perspective

	Contract Actions (Thousands)	Dollars (Billions)	ASBCA Appeals Filed/ Appeals Pending
FY 96	2,120	41	185/268
FY 97	1,719	37	140/231
FY 98	1,200	35	153/253
FY 99	908	36	123/262

Source: SAF/AQC Bluebook
http://www.safaq.hq.af.mil/contracting/workforce/b

Major Claims, 1980 to 1997
Cases With Claims Over $1 Million



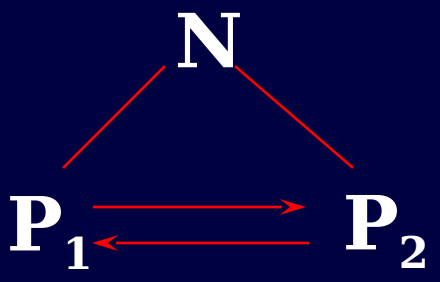
Interim Results of an ABA Public Contract Law Section ADR Survey

Estimated cost to litigate a discovery-intensive $100,000 changes claim	$38,000
Estimated cost to litigate a discovery-intensive $100,000 delay claim	$40,000
Estimated cost to convert a T/D into a T/C	$60,000

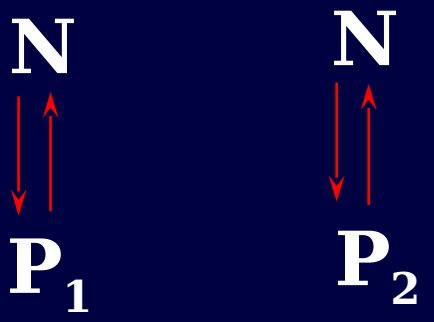
NEGOTIATION	ALTERNATIVE DISPUTE RESOLUTION			LITIGATION
Unassisted Negotiations	**Assisted Negotiations**	**Outcome Prediction Assistance**	**Binding ADR**	**Public Adjudication**
Fact Finding	Mediation	Settlement Judge/Early Neutral Evaluation	Binding Arbitration	Court of Federal Claims
	Mini-Trial (followed by Unassisted Negotiations or Mediation)	Non-Binding Advisory Opinion	Board Summary Trial with Binding Decision	Board of Contract Appeals
		Dispute Review Boards	Some Court-Annexed ADR Programs	Other Misc. Dispute Resolution Forums
				Federal Circuit and Other

Mediation

Process Dynamics:
Third-party assisted negotiations



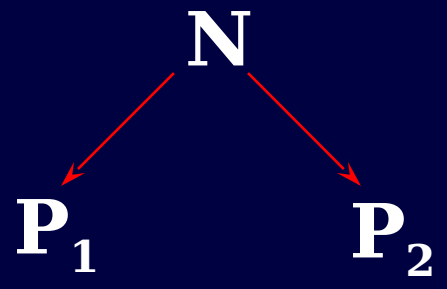
Unique Feature:
Confidential caucuses



Decisionmakers:
The parties

Early Neutral Evaluation

Process Dynamics:
Third-party assistance with negotiations



Unique Feature:
-evaluation of likely outcome
-assessment of facts and/or methodology

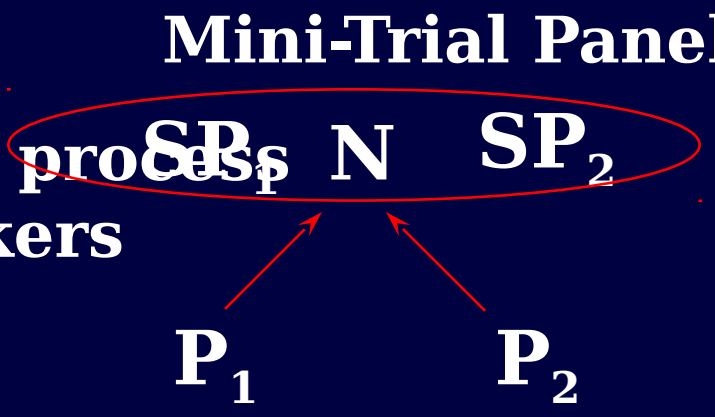
Briefing or Report

Decisionmakers:
The parties

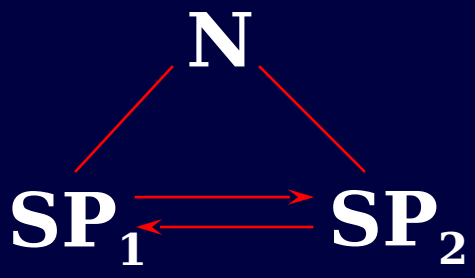
P_1 + P_2

Mini-Trial

Process Dynamics:
Hybrid settlement negotiation process combining senior-decisionmakers with mediation



Unique Feature:
Involvement of senior-decisionmakers

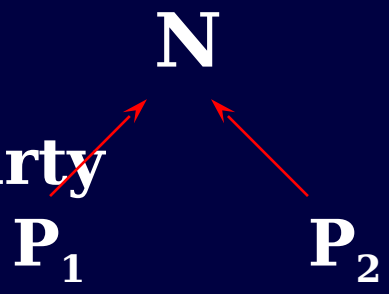


Decisionmakers:
The parties

SP1 + SP2

Arbitration

Process Dynamics:
Case presented to third-party in an expedited manner and third-party makes a decision



Unique Feature:
Potentially binding decision

Binding Award
High-low Award
Final-offer Award

Decisionmakers:
The Arbitrator

Note:
The Air Force is not authorized to agree to binding arbitration until Arbitration Guidelines are issued.

ADR CASE SCREENING

1. **What Are Our Business Objectives With Regard to this Dispute?**

2. **Why Did Negotiations Reach Impasse? (Ensuring that ADR Use Makes Sense & Then Fitting the Form to the Fuss)**

3. **What Would it Take to Resolve This Case?**

ADR CASE SCREENING

1. What Are Our Business Objectives With Rega this Dispute?
   - What Business Interests Are Being Served?
     - Relationship Preservation
     - Flexibility in Shaping Relief
     - Provide an Important Capability to the Warfighter

ADR CASE SCREENING

2. **Why Did Negotiations Reach Impasse? (Ensu that ADR Use Makes Sense & Then Fitting th to the Fuss)**

- **Strong Emotions on One or Both Sides?**
- **Does the Contractor Have a Claims Strategy?**
- **Differing Perceptions About the Merits**

ADR CASE SCREENING

3. What Would it Take to Resolve This Cas

- Third Party Intervention
- Independent Evaluation
- Decision

Timing of ADR Use

- **ADR Use Prior to Final Decision**

- **ADR Use Prior to Contract Disputes Act (CDA) Claim Submission**

- **ADR Use After CDA Claim Submission**

- **ADR Use After Issuance of Contracting Officer Final Decision**

- **ADR Use Any Time Prior to ASBCA Decision**

Designing the ADR Process
Guidelines for Drafting ADR Agreements

- **Written Agreement Recommended**
- **Select the ADR Process**
  - **Fact-Finding**
  - **Mediation**
  - **Early Neutral Evaluation**
- **Then Chose the Neutral**
- **Choose the Right Principal and Get Them to Commit to the ADR Process**

- Carefully limit discovery/factual exchanges
- Provide for the exchange of information

Selecting the Right Third Party Neutral

- **Considerations When Choosing a Neutral:**
  - **Neutrality**
  - **Training**
  - **Experience**
  - **Subject Matter Expertise in the Type of Controversy**
  - **Patience, Good Listening & Facilitation Skills are Important . . . So is a Sense of Humor**

Selecting the Right Third Party Neutral

- **Mechanics of Engaging a Neutral**
  - **Private Sector Neutrals**
  - **GAO Attorneys as ADR Neutrals**
  - **Boards of Contract Appeals Judges as ADR Neutrals**
  - **United States Court of Federal Claims**
  - **United States District Courts**

Lessons Learned

- Once Voluntarily Agreed to by the Parties, the Vast Majority of ADRs Result in Resolution
- Begin With the End in Mind: Settlement Mechan Payment Issues Need to Be Addressed Early in th
- Be Flexible -- Change Things That Are Not Worki and Keep Those That Are
- If the Parties Are Not Prepared (Including the Of Side), the ADR May Fail -- Both Sides Need to Jus A Settlement to Their Management

Lessons Learned

- **Get the Right Business Principals Involved**
- **Be Sure the Government Team is Really a Tea**
- **Be Careful When Choosing a Neutral**
- **Be Sure the Neutral is Familiar With the Cont And is Prepared to Engage With the Parties**

Lessons Learned

- **Neutrals Will (Depending on the Type of ADR Used)**
  - **Frequently Provide Candid Assessments of a Case --**
    - **This Assessment Should Not Weaken A Strong Case**
    - **Information Exchange & Realistic Schedules Are Essential**
    - **Should Strengthen A Weak One**

- **Preserve & Protect Privileged Communication**

Lessons Learned

- ***Ex Parte*** **Communication Can Be Beneficial in Certain Types of ADR (Like Mediation)**
- **Demonstrative "Evidence" is Very Effective in**
- **While the Rules of Evidence Do Not Apply -- I Admissible Evidence (Especially if it Comes f Other Side's Documents) Can Be Very Effecti Used in ADR**

AFMC/JA ADR INITIATIVES

DIRECTION TO ALL AFMC ATTORNEYS

- Resolve Disputes Without Litigation

- ADR First, Litigation Last Resort

  - Cross Feed Lessons Learned

  - Consistently Evaluate the Process

AFMC/JA ADR INITIATIVES

DIRECTION TO FIELD ATTORNEYS

- Identify/Report Quarterly All Contract Disputes Having Potential for Litigation
- Advise on ADR Use Before Issuing Final Decision
- Contact Trial Team Early for Advice/Assistance

AFMC/JA ADR INITIATIVES

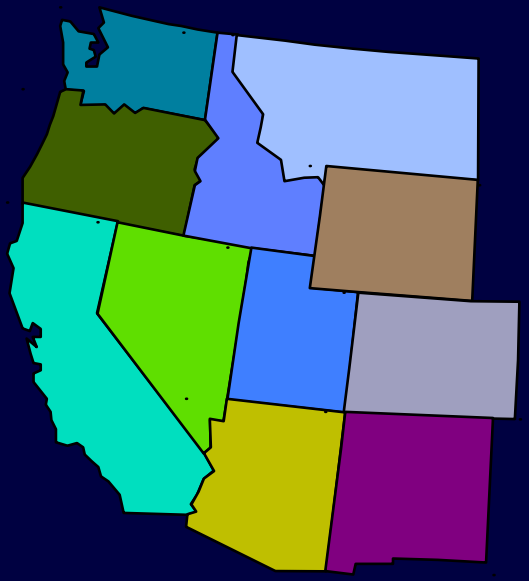
DIRECTION TO THE TRIAL TEAM

- Offer ADR in Virtually Every Case Presently on Litigation Track
- Resist a Negative Response From Ktrs With a Corporate ADR Agreement
- Develop Open Communication With Corporate Counsel

CONTRACT LITIGATION

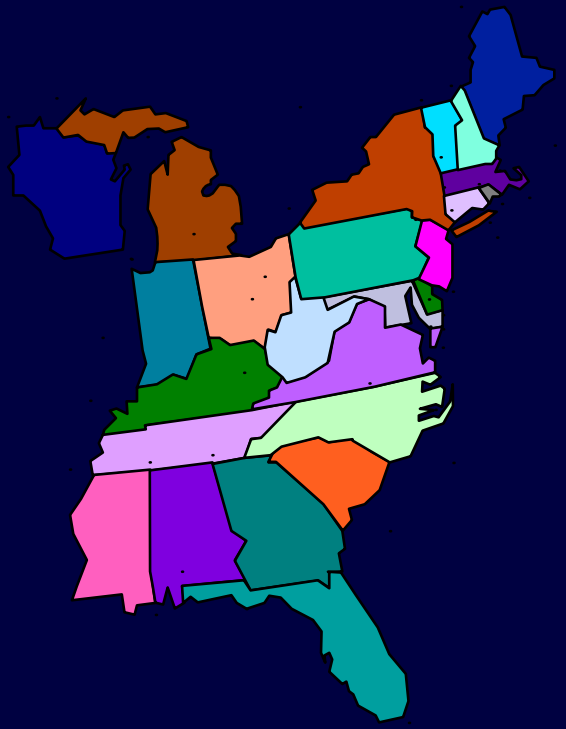
GEOGRAPHIC REGIONS (Historical)

WESTERN DIVISION



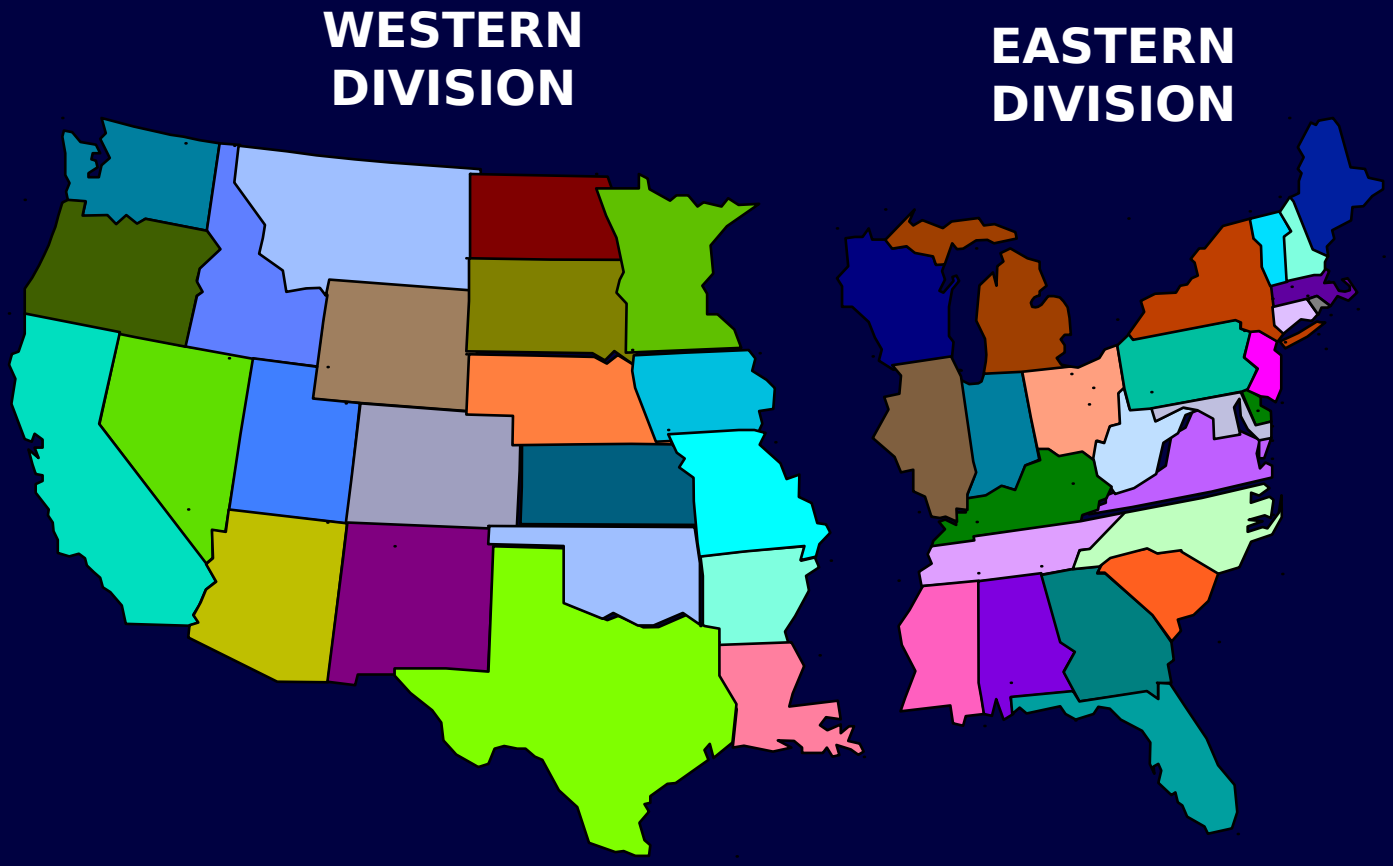
CENTRAL DIVISION

EASTERN DIVISION



CONTRACT LITIGATION

GEOGRAPHIC REGIONS (Today)



ADR DIVISION

- **PEO/DAC Programs**
- **Cases Valued >$10M**
- **Cases Whose Contractors Have Signed Umbrella ADR MOA w/AQ**
- **High Interest Cases**

AFMC/JA ADR INITIATIVES

- **Goals**
  - Improve Percentage of Cases Settled w/out Litigation
  - Train Attorneys in ADR Techniques
  - Use ADR on All Cases With Contractors Having Umbrella ADR Agreements
  - Open Line of Communication w/ Corporate Counsel

AFMC/JA ADR INITIATIVES

1st QUARTER CY 2000 RESULTS

- **TOTAL CANDIDATE ASBCA APPEALS** **184**
- **TOTAL PRE-APPEAL CASES** **23**
- **ADR OFFERED (Appeals only)** **98** **52%**
  - **Accepted** **42** **43%**
  - **Rejected** **14** **14%**
  - **Not Yet/No response** **19** **11%**
- **ADRs COMPLETED (incl. 2 pre-appeals)** **13**

Air Force ADR Program

RESULTS:

- 17 CORPORATE-LEVEL ADR AGREEMENTS IN PLACE
- 88 PROGRAM-LEVEL ADR AGREEMENTS IN PLACE
- $1 BILLION IN CONTRACT DISPUTES RESOLVED THROUGH THE USE OF ADR IN THE PAST 18 MONTHS
- ESTABLISHED THE ADR ADVISORY TEAM
- INITIATED A DATA CALL TO ESTABLISH AN EARLY WARNING SYSTEM FOR CONTRACT DISPUTES

CONCLUSION

- ADR IS THE LAW (ADRA 1990 & 1996, E.O., FAR)
- AIR FORCE HAS AN ADR IMPLEMENTATION PLAN / GOAL
  - http://www/adr.af.mil/
- ADR LEAVES THE PM AND PCO IN THE DRIVER'S SEAT
- ADR SHOULD CONSIDERED IN EVERY